Tenaga Nasional Bhd v Trans Resources Corp Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S6–22–981 OF 2003
HARMINDAR SINGH JC
29 MAY 2009

Civil Procedure — Action — Cause of action — Compensation for damage — Plaintiff's electrical installation damaged by defendants' construction — Whether plaintiff's action to recover compensation for consequential losses established — Whether strict liability imposed upon defendants by s 41 of the Electricity Supply Act 1990

Tort — Negligence — Electricity supplier — Damage caused to electricity supplier's installation by defendants' piling works — Whether such works prima facie evidence of negligence — Whether onus on defendants to show damage occurred without any negligence

The plaintiff alleged that an electrical installation belonging to it, viz a 33KV electricity cable, was damaged due to construction piling work carried out by the defendants. The plaintiff sued the defendants in the High Court to recover compensation for consequential losses. On the day of the trial, counsel for the defendants informed the judicial commissioner ('JC') that he had instructions to cease representing the defendants and had that very morning filed an application to discharge himself as counsel. He sought a stay and/or adjournment for the defendants to engage a new counsel. The learned JC, having considered all relevant circumstances, refused to stay and/or adjourn the hearing. Counsel then informed the JC that he could not participate in the trial and that the trial would proceed in the absence of the defendants and/or their agents. However, counsel remained in court to listen to the proceedings but refused to cross-examine witnesses for the plaintiff when invited by the JC to do so. The issue for the High Court was whether the plaintiff had proved its case; ie whether the defendants were in fact responsible for the damage caused to the plaintiff's cable.

Held, allowing the plaintiff's claim with costs:

(1) The witnesses for the plaintiff testified that the defendants were the only

contractors working at the site where the cable was damaged at the material time. This was evidenced by heavy machinery and lorries belonging to the defendants at that site. Further, the defendants had by letter informed several parties, including the plaintiff that it would be carrying out piling works at the site. The plaintiff had even responded by letter to the defendants' consultant suggesting measures to protect the plaintiff's 33 KV cable (see para 7).

(2) Section 41(1) of the Electricity Supply Act 1990 imposes strict liability on anyone who causes damage to any installation belonging to the plaintiff. This is made clear by the words 'whether willfully or otherwise'. Thus, once the plaintiff was able to prove that it was the defendants who caused the damage to its installation, the defendants would become liable to compensate the plaintiff for the damage sustained (see para 9).

(3) The defendants were aware of the plaintiff's cable. The act of the defendants in damaging the cable due to their piling works constituted prima facie evidence of negligence. The burden was thus on the defendants to introduce evidence to explain or show that the damage occurred without any negligence on their part. However there was no such evidence and they even failed to attend the trial. Thus, negligence had been proven on the part of the defendants. They were therefore liable for damages to the plaintiff (see para 11).

[Bahasa Malaysia summary

Plaintif mendakwa bahawa pemasangan elektrik kepunyaannya, melalui 33 KV kabel elektrik, rosak kerana kerja-kerja pembinaan memantak yang dijalankan oleh defendan-defendan. Plaintif menyaman defendan-defendan di Mahkamah Tinggi untuk mendapatkan pampasan untuk kerugian berbangkit. Pada hari perbicaraan, peguam kepada defendan-defendan memaklumkan pesuruhjaya kehakiman ('PK') bahawa dia telah menerima arahan untuk berhenti mewakili defendan-defendan dan pada pagi tersebut dia telah memfailkan permohonan untuk menyingkirkan dirinya sebagai peguam. Dia menuntut satu penggantungan dan/atau penangguhan kepada defendan-defendan untuk melantik peguam yang baru. PK yang bijaksana, setelah mempertimbangkan keadaan tersebut, enggan untuk menggantung dan/atau menangguhkan perbicaraan. Peguam tersebut kemudiannya memaklumkan PK bahawa dia tidak dapat melibatkan diri dalam perbicaraan tersebut dan bahawa perbicaraan itu akan diteruskan tanpa kehadiran defendan-defendan dan/atau ejen mereka. Walau bagaimanapun, peguam tersebut akan kekal berada dalam mahkamah untuk mendengar perbicaraan tersebut tetapi enggan untuk memeriksa-balas saksi-saksi plaintif apabila dijemput oleh PK untuk melakukannya. Isu untuk Mahkamah Tinggi ialah

A sama ada plaintif telah membuktikan kesnya; sama ada defendan-defendan sebenarnya bertanggungjawab untuk kerosakan yang dilakukan kepada kabel plaintif.

B **Diputuskan**, membenarkan tuntutan plaintif dengan kos:

(1) Saksi-saksi bagi pihak plaintif memberi keterangan bahawa defendan-defendan adalah kontraktor-kontraktor yang bekerja di tapak tersebut di mana kabel tersebut dirosakkan pada masa material. Ini C dibuktikan melalui mesin-mesin berat dan lori-lori kepunyaan defendan-defendan di tapak tersebut. Selanjutnya, defendan-defendan telah memaklumkan beberapa pihak melalui surat, termasuk plaintif bahawa mereka akan menjalankan kerja-kerja memancak di tapak tersebut. Plaintif juga telah membalas melalui surat mencadangkan D langkah-langkah untuk melindungi kabel 33 KV plaintif kepada perunding plaintif-plaintif (lihat perenggan 7).

(2) Seksyen 41(1) Akta Bekalan Elektrik 1990 mengenakan liabiliti ketat ke atas sesiapa yang menyebabkan kerosakan kepada mana-mana E pemasangan kepunyaan plaintif. Ini dijelaskan melalui perkataan 'whether willfully or otherwise'. Oleh itu, apabila plaintif mampu membuktikan bahawa defendan-defendan yang menyebabkan kerosakan pemasangan tersebut, defendan-defendan bertanggungan untuk memberi pampasan kepada plaintif atas kerosakan yang dialami F (lihat perenggan 9).

(3) Defendan mengetahui tentang kabel plaintif. Tindakan defendan-defendan merosakkan kabel kerana kerja-kerja memancak merupakan prima facie bukti kecuaian. Oleh itu beban adalah ke atas defendan-defendan untuk mengemukakan bukti bagi menjelaskan atau G menunjukkan bahawa kerosakan berlaku tanpa kecuaian pihak mereka. Walau bagaimanapun tiada bukti mengenainya dan mereka juga gagal menghadiri perbicaraan tersebut. Oleh itu, kecuaian telah dibuktikan pada pihak defendan-defendan. Maka mereka bertanggungan untuk ganti rugi kepada plaintif (lihat perenggan 11).]

H **Notes**

For a case on electricity supplier, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1026.

For cases on cause of action, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) I paras 43–58.

Cases referred to

Kris Angsana Sdn Bhd v Eu Sim Chuan @ Eu Sam Yan & Anor [2007] 5 MLJ 13, CA (refd)

MA Clyde v Wong Ah Mei & Anor [1970] 2 MLJ 183, FC (refd)
Teoh Guat Looi v Ng Hong Guan [1998] 4 MLJ 525, CA refd)

Legislation referred to
Electricity Supply Act 1990 ss 2, 40, 41

Md Tajuddin bin Md Isa (Azira bt Mohamad with him) (Md Tajuddin & Co) for the plaintiff.
Rohan Arasoo Jeyabalah (Azman, Davidson & Co) for the defendants.

Harmindar Singh JC:

[1] The plaintiff is a public listed company licensed to supply electricity under the Electricity Supply Act 1990. The plaintiff owned an electrical installation, namely an XLPE 6350Q mm 1 core underground cable ('33KV cable') within the vicinity of Jalan Pandamaran, Klang, Selangor. The defendants were carrying out a joint venture project in the name of TRC Ho Hup Joint Venture for the construction of a railway link to Pulau Indah, Selangor.

[2] On 22 July 1997 there was a massive power failure in Pulau Indah, Selangor in particular the Westport and the surrounding areas which after investigation by the plaintiff revealed that it was due to a damaged 33KV cable belonging to the plaintiff. The plaintiff is alleging that this damage was caused by the defendants.

[3] The issues therefore before the court were:

(a) whether it was the defendants who caused the damage to the 33KV cable;

(b) if so, whether the defendants were liable to compensate the plaintiff for the losses suffered; or

(c) in the alternative, whether the defendants were negligent in causing the damage.

[4] On the day of the trial, counsel for the defendants informed the court that he had instructions to cease to act for the defendants. He also said that he had filed on that very morning of the trial an application to discharge himself as counsel. He asked for a stay of proceedings until the defendants were able to engage a new counsel. Effectively, he was seeking an adjournment.

[5] After due consideration, the application for adjournment was refused. Reasons were given for this refusal. They appear in the notes of proceedings as follows:

> Adjournment is not allowed. Parties knew for some time that this case is fixed for hearing today. The defendants should know and realise that the case was going to proceed today. If they had wanted new solicitors, they should have been present today. This case has also been pending for a long time. The events which give rise to this cause of action occurred some 12 years ago. For these reasons, the adjournment is not allowed. You are free to decide whether you wish to represent the defendants or walk away. Under the rules, you are still counsel until discharged.

To this decision, counsel for the defendants responded that he could not partake in the trial and that the trial would be proceeding in the absence of the defendants. Notwithstanding his response, counsel for the defendants did not leave but remained in court to listen to the proceedings. He was even asked by the court to cross-examine the plaintiff's witnesses but he declined which was consistent with the stance that he had adopted.

[6] To prove their case, the plaintiff called three witnesses. The sum testimony of the witnesses was that upon visual inspection, it was discovered that the power failure was a result of the damage to a 33KV cable located at the point where the defendants were the only contractors carrying out the works. The witnesses found that piles driven into the ground had hit the 33KV cable.

[7] So were the defendants responsible for the damage to the cable? I think there was little doubt about this. The witnesses testified that the defendants were only contractors at that time carrying out works in the area for the construction of a railway line to the Westport area. This was evidenced by the heavy machinery and lorries present at that precise area belonging to the defendants. There was further evidence that the defendants in their letter dated 23 June 1997 addressed to several parties including the plaintiff informed that piling works would be carried out in that area. This was responded to by the plaintiffs in the letter dated 30 June 1997 to the defendants' consultant suggesting measures to protect the 33KV cable from damage. For these reasons, I was more than satisfied that the 33KV cable in question was damaged by the defendants.

[8] Were the defendants therefore liable to compensate the plaintiff for the damage? In this regard, it would be pertinent to refer to s 40 of the Electricity Supply Act 1990 (the Act) which reads as follows:

> 41 Compensation for Damage
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> (1) Any person who removes, destroys or damages whether wilfully or

> otherwise, any installation or any part thereof, or any public lamp or any post, bracket or other means or support of a public lamp, or any instrument used in connection with any installation for recording the output or consumption of energy, shall, in addition to any penalty to which he may be liable under this Act, be liable to pay full compensation for damage he has done and the compensation shall be recoverable by civil action or suit before any court.

Section 2 of the Act defined 'installation' as follows:

> 'installation means the whole of any plant or equipment under one ownership or, where a management is prescribed the person in charge of the same management, designed for the supply or use or both, as the case may be, of energy; including prime movers, if any, with all necessary plant, buildings and land in connection therewith, pipe line, supply line and consuming apparatus, if any;

Section 2 of the Act defined 'supply line' as follows:

> 'supply line' means a conductor or conductors or other means of conveying, transmitting or distributing energy, together with any casing, coating, covering, tube, pipe, insulator, or post enclosing, surrounding or supporting the same or any part thereof, or any building or equipment connected therewith for the purpose of transforming, conveying, transmitting or distributing energy.

[9] From a reading of these provisions, it was clear that s 41 of the Act provides a strict liability on anyone who causes damage to any installation belonging to the plaintiff. This is made clear by the words 'whether willfully or others'. This would mean that once the plaintiff was able to prove that it was the defendants who caused the damage to the installation of the plaintiff, they would become liable to compensate the plaintiff for the damage sustained.

[10] Were the defendants also negligent? In the case of *Kris Angsana Sdn Bhd v Eu Sim Chuan @ Eu Sam Yan & Anor* [2007] 5 MLJ 13, the facts were that the defendants had commenced construction works extensively on a project site. Next door was the plaintiff house suffered structural damage due to the negligent construction work of the defendant. In that case, the Court of Appeal held that the defendant owed the plaintiff a duty of care but had failed to perform it and damage ensued resulting from that failure.

[11] In the instant case, the defendants were aware of the plaintiff's cable. They had in fact been advised by the defendants to construct a 'GI pipe 18

A inches' or 'PCV piping' convered with concrete to protect the defendants. In my view the act of the defendants in damaging the cable due to the piling works constituted prima facie evidence of negligence. In such case, the burden was then on the defendants to introduce evidence to explain and show that the damage occurred without any negligence on their part (*Teoh*
B *Guat Looi v Ng Hong Guan* [1998] 4 MLJ 525; *MA Clyde v Wong Ah Mei & Anor* [1970] 2 MLJ 183. In this case, not only was there no such evidence but they even failed to turn up for trial. In the circumstances, I was satisfied that negligence had been proven on the part of the defendants and they were therefore liable for damage to the plaintiff.

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[12] In the premises, for the reasons that appear in the foregoing, the defendants are liable to the plaintiff for the damage as claimed. As was directed during the case management proceeding, the senior assistant registrar is to access the damages. The plaintiff is also entitled to costs of the action.

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Plaintiff's claim allowed with costs.

Reported by Andrew Christopher Simon

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